IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

INTERNATIONAL BUSINESS MACHINES CORPORATION,	)	
Plaintiff,	)	C.A. No. 16-122-LPS
v.	)	
GROUPON, INC.,	)	
Defendant.	)	

Monday, June 18, 2018
1:05 p.m.
Courtroom 6B

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE LEONARD P. STARK
United States District Court Judge

APPEARANCES:

POTTER ANDERSON & CORROON, LLP
BY: DAVID MOORE, ESQ.

-and-

DESMARAIS, LLP
BY: JOHN M. DESMARAIS, ESQ.
BY: KARIM Z. OUSSAYEF, ESQ.
BY: LAURIE N. STEMPLER, ESQ.
BY: BRIAN D. MATTY, ESQ.
BY: ROBERT C. HARRIS, ESQ.
BY: MICHAEL MATULEWICZ-CROWLEY, ESQ.

Counsel for the Plaintiff

APPEARANCES CONTINUED:

ASHBY & GEDDES
BY: JOHN G. DAY, ESQ.

-and-

FENWICK & WEST, LLP
BY: J. DAVID HADDEN, ESQ.
BY: SAINA S. SHAMILOV, ESQ.
BY: PHILLIP J. HAACK, ESQ.
BY: JESSICA BENZLER, ESQ.
BY: ATHUL ACHARYA, ESQ.

Counsel for the Defendant

THE COURT: Good afternoon. I'll have you put your appearances on the record first, please.

MR. MOORE: Good afternoon, Your Honor. David Moore from Potter, Anderson on behalf of IBM. With me today from the Desmarais Firm are John Desmarais.

MR. DESMARAIS: Good afternoon, Your Honor.

MR. MOORE: Karim Oussayef, Laurie Stempler. And in the row behind that are Michael Matulewitz-Crowley, Robert Harris and Brian Matty. We also have summer associates viewing the hearing today, Your Honor.

THE COURT: That's fine. Thank you. Welcome everyone.

MR. DAY: Good afternoon, Your Honor. John Day from Ashby & Geddes for Groupon. With me from Fenwick & West, David Hadden. Saina Shamilov. Phillip Haack. In the back row, Athul Acharya and Jessica Benzler.

THE COURT: Good afternoon.

Welcome again to everyone. So we're here for the pretrial conference for the

trial that is set to begin July 16th. As I'm sure you have seen, last week we docketed the opinion on the Daubert motions and the motions in limine as well as some other issues in the pretrial order. Earlier today we docketed the opinion on summary judgment.

So my agenda for today there is the motion to strike related to the supplemental damages report. We'll start with argument on that. There is a few open issues that I identified in the motion in limine opinion and maybe a few others that I have noticed, so I'll bring those up with you. And I'll certainly give you all an opportunity to present any other issues that you might like.

We'll run through at least briefly some of the mechanics of what the trial will look like. Are there any questions before we begin all that? From IBM?

MR. DESMARAIS: None from the plaintiff, Your Honor.

THE COURT: How about from Groupon.

MR. HADDEN: No, Your Honor.

THE COURT: Let's start again with argument, limited argument, but some argument if you wish on Groupon's motion to strike.

MS. SHAMILOV: Good afternoon. I think IBM laid out the issues. I will address some of the issues that opposing counsel may bring up in opposition, but basically the report was served too late, there was no new data that the report relies on. We did not consent to service of that report. The submission of the report could have been presented in the opening report and included there, they were not, just right now it's just too late to serve them. And that's why it should be stricken, Your Honor.

THE COURT: All right. I do have questions about all of that. You say it's just too late, but it's hard for me to understand that. You know, a significant trial team even just here in the courtroom, it's a three-page update of calculations. We have what, a month until trial. How much work would it really be or why should I view it as too much to ask you if you wished to file your own supplement?

MS. SHAMILOV: Yes, I think the

question is if we have a schedule and the requirement and the order from the Court to say when to disclose opinions and that deadline passed six months ago, and there is no data that was produced or provided or nothing new happened, and the information and the opinions that should have been disclosed six months ago are now disclosed now, which significantly changes the damages figure in the case and we're preparing -- the trial starts in four weeks, we will need to, you know, prepare a rebuttal. If Your Honor is somehow inclined to allow that in, I think the other side needs to pay for the fees and the legal fees and our expert fees to prepare a response because we would have responded to this in our rebuttal to their opening damages report and there was absolutely no reason why they shouldn't have or couldn't have included the opinion that they serve now six months ago when it was actually due.

THE COURT: So I guess we'll need to bring this down a little bit. They served interrogatories. They served request for production of documents. It asked for various

financial information and I think it said through the present.

MS. SHAMILOV: Correct.

THE COURT: And you have an obligation to supplement, they have an obligation to supplement their expert report. And there are practices that I have some knowledge of. Why didn't Mr. Housman reasonably assume that sometime before trial he was going to get, given all of that, some additional financial information from Groupon?

MS. SHAMILOV: I think you could assume it, but I don't think that has anything to do with whether he could or couldn't have estimated the calculations that he's presenting now six months ago.

Also, I think generally when you -- when the plaintiff request information through trial and expects to supplement the report, the interrogatories and RFPs call for information either through -- give me a financial information from date X or give me financial information from date X through trial. They didn't do that. Instead they served

discovery that said give me financial information from the date X through the present. That is not what generally plaintiffs ask in these situations.

THE COURT: Wasn't it at least a reasonable mistake, if that's what it was, when they said through present that they thought you would know that meant he better update you through the present day as we get closer to trial?

MS. SHAMILOV: If it was an interrogatory response that may be a mistake, but there were multiple discovery requests that were phrased that way. And so -- and then plus there is -- we are so close to trial, they themselves cite to cases in their briefing that says to the extent there is no damages for a particular period before trial, if the jury returns damages verdict Your Honor can take into consideration that verdict, and if there was a missing damages period presented to the jury and adjust it if necessary at that time, so that is certainly what Your Honor can do if the jury returns with a damages verdict.

THE COURT: But I would have thought that probably cuts against you. I mean, why not, we're going to have a jury here, you're going to present your damages theories, why should I invite potential further litigation after trial when we could just resolve it at trial?

MR. HADDEN: This would be a nonissue if we win.

THE COURT: Well, that's true.

All right. Anything else you want to add?

MS. SHAMILOV: Not at this moment, Your Honor.

THE COURT: Let me hear from IBM.

MS. STEMPLER: Good afternoon. Laurie Simpler on behalf of IBM.

With respect to the discovery request of the interrogatories that we issued, we also included an instruction that said that we were expecting Groupon to supplement their responses in accordance with Rule 26. And with respect to one of the requests at least, request number 33, that was not bounded by the present,

but we did expect that using that phrase they would understand that we expected them to supplement. Section 284 entitles IBM to a reasonable royalty to compensate it for Groupon's use of the patented technology. And that use continues after the date that they decided to stop producing data. We're talking about a three-page supplement. It's just math. And it's not even clear what their expert would have to change in his rebuttal opinion because his criticisms of Dr. Housman focused on methodology and not the number.

In terms of we could have estimated, we asked for updated data from them. When we didn't get it -- this was back in May. When we didn't receive it, then Dr. Housman decided well, I'll use the next best thing and I'll do my best to estimate.

THE COURT: There is reference I think in your letter to other supplements of other reports over the course of this litigation. And I have this provision in the scheduling order here that said you can't serve additional expert reports without consent or

order from the Court. Were any of those supplements ones that the parties expressly asked each other for consent on?

MS. STEMPLER: I believe one of the corrected reports, Groupon did notify us that they were going to serve a corrected reports to deal with the additional Priceline agreement the parties had also agreed because that was new information, and it's the same thing here under Rule 26 that in addition to them being required to supplement, Dr. Housman is required to supplement to account for additional information which are the sales from July 2017 through the present.

THE COURT: Anything else?

MS. STEMPLER: No, Your Honor.

THE COURT: Okay. Any reply?

MS. SHAMILOV: Very quickly, Your Honor, if I may.

THE COURT: Sure.

MS. SHAMILOV: Just very quickly, Your Honor. Since the report was served, the report, opening reports were served in September. Their reply reports, supplemental

reports, depositions took place at the beginning of 2018. At no point throughout this entire period until May 2nd did IBM ask for supplemental information or that we expect you to supplement data regarding your sales through July 17 or we're going to serve supplemental reports from Dr. Housman. And the very first time this was raised, we were actually negotiating the pretrial order on May 2nd.

I think if rules mean anything, this is just too late, Your Honor. And they had many opportunities to raise it. That's all I'm saying. Thank you.

THE COURT: Thank you.

I don't agree with the defense's position. I am denying the motion to strike. In my view, IBM is meeting its obligation to supplement its expert report by supplementing the damages figure of the damages it's seeking through trial.

In part having looked at what was served in discovery and understanding something about the course of this litigation, I don't think that what has happened here was any

surprise to Groupon. I don't think that Groupon is prejudiced in any material way by it. I think that they can fairly easily prepare a rebuttal response if they wish to do so. Alternatively, they can, although I'm not ordering it, they can provide at this point if they wish the updated data and the parties can then all appropriately respond to it.

I also don't think that that would be unfair or unduly prejudicial to either side. You are all experienced trial lawyers. There are a lot of you here. That's not a lot to do in the next four weeks.

If there was any failing by IBM, I would find that it's substantially justified and largely harmless. I don't think Pennypack factors apply, but if they do, they certainly don't favor exclusion for reasons including those that I have ready said.

And one other thing, at least in my experience, damages experts frequently seem to sit through the entirety of the trial. And it seems to me that one reason they do that is they like to have the opportunity to perhaps

respond a little bit to things that they see happen in real time during trial.

Whether that's going to happen in this case, whether I will permit it, whether there will be objections, those are all questions we will have to see, but I think it puts it in context that what's happened here, if it was any failing at all on IBM's part it's a very minimal one and not really prejudicial to the defendants. And it's something defendants can deal with I think quite easily. So the motion is denied.

Any questions about that?

MS. SHAMILOV: No, Your Honor.

THE COURT: Any questions?

MS. STEMPLER: No, Your Honor.

THE COURT: Let's move on to some other issues. There might be a dispute about whether joint infringement is being alleged and if so, which patents. And so let's first find out if IBM thinks it's asserting that, and if so whether there is a dispute about it.

MR. OUSSAYEF: Your Honor, Karim Oussayef for IBM.

Yes, IBM is alleging joint or also called attributed infringement. And that theory was disclosed both in its infringement contentions and also in its expert report. And both of those specifically related to the '967 and the '849 patents. Both of those were specifically called out in both the infringement contentions and its expert report.

THE COURT: These are the Philip patents; correct?

MR. OUSSAYEF: Yes, that's correct Your Honor.

THE COURT: Do you understand there to be a dispute on this?

MR. OUSSAYEF: I understand the defendant's position is that we did not adequately disclose joint infringement, although I can't speak for defendants, that's my understanding of their position.

THE COURT: Thank you. Let me hear from defendants, is there an issue on this?

MS. SHAMILOV: Your Honor, yes, there is an issue, to the extent during summary judgment briefing the joint infringement

arguments made by IBM was not something in their expert reports, so to the extent that is the theory that will be advanced at trial, which we don't know yet, which joint infringement would, there is no supporting expert reports for that. That's the nature of the dispute right now.

THE COURT: So as you probably know, normally I would deal with objections that certain expert testimony is beyond the scope of what was fairly disclosed at trial. Is defendant asking me to depart from that practice on this dispute or is this something we can deal with at trial?

MS. SHAMILOV: I guess it would be good for us to know IBM isn't expecting or intending to advance the joint liability issue as articulated in their summary judgment motion now.

THE COURT: So you agree that they preserved the right to proceed on joint infringement, but the articulation of the theory that you saw in the briefing on summary judgment you say was not disclosed?

MS. SHAMILOV: Correct.

THE COURT: All right.

Mr. Oussayef, I don't know if that helps, or do you have anything to say in response?

MR. OUSSAYEF: Yes, Your Honor. I believe this is an issue that could have properly been raised at summary judgment. This was a position that Groupon took with respect to the '601 patent. They allege that our theory had somehow changed. We disagreed with them. I think the proper procedure is if they believed that the theory has changed, they could have brought it up at summary judgment. To put it in a new issue in the pretrial order doesn't seem to make sense particularly in light of the fact that there is specific citation in footnote three to the pretrial order that specifically outlines exactly where those theories were produced and disclosed.

THE COURT: Thank you.

Ms. Shamilov, anything you want to say in response?

MS. SHAMILOV: I think the parties are bound by what their experts disclose. There is no such thing as a waiver, that is not

pointing something out in the summary judgment which I think we did, but I don't think that means that their expert can talk about stuff that's not in their expert report.

THE COURT: All right. Thank you. So I am going to the extent there is a conflict here defer resolving it until it comes up if it does at trial. I think the parties are in agreement, and certainly this is my finding, that IBM has disclosed some theory of joint infringement of the '967 and '849 patents. IBM has an obligation, as both parties do, to have fairly disclosed any expert support for that theory, including in any expert reports, declarations and depositions. There is a process discussed I think in the pretrial order, if you have questions about it, you'll let me know, whereby you will disclose on a witness by witness basis whatever exhibits you intend to introduce through that witness as well as any demonstratives you intend to use. Typically that gives you a pretty good clue as to what testimony is going to be proffered, and to the extent that doesn't, then as you hear it, you

have the right to stand up and object. And if there are objections that something was not fairly disclosed previously, we'll deal with those at trial.

Any questions about that?

MR. OUSSAYEF: No, Your Honor.

THE COURT: Questions?

MS. SHAMILOV: No, Your Honor.

THE COURT: Okay. How about doctrine of equivalents. For what patents, if any, is IBM asserting doctrine of equivalents infringement? I want to make sure similarly we don't have a dispute as to what's going to be at issue here.

MR. OUSSAYEF: Yes, Your Honor. IBM is alleging doctrine of equivalents theory for the '849 patent. I think there was -- I did read Your Honor's opinion from earlier today where there was a footnote that expressed that perhaps there was some confusion over the doctrine of equivalents theory. I think the reason why the issue did not come up during summary judgment is our doctrine of equivalents theory is not specific to what Groupon was

alleging in its summary judgment brief. So, for example, Groupon was arguing that, you know, areas had to be fixed and separate, and our doctrine of equivalents argument is not about whether things are fixed or separate, so that's why it did not come up during summary judgment briefing.

THE COURT: But you're only proceeding on a doctrine of equivalents on the '849?

MR. OUSSAYEF: Excuse me, also the '601 patent. I apologize, Your Honor. So the '601 patent is a theory that Your Honor discussed in the opinion from earlier today. That is also doctrine of equivalents.

THE COURT: Thank you. Do defendants understand that and/or have any objection to that?

MR. HADDEN: No. We understand that, Your Honor. I think we'll deal with it as Your Honor suggest at trial to the extent it goes beyond their expert report or goes to what's covered by the prior art.

THE COURT: Thank you. Let's talk

about where we are on objections based on authentication. I'll let plaintiffs address this first.

MR. OUSSAYEF: Your Honor, with respect to authentication, I believe there had been a proposal by defendants about the stipulations that might be able to be stipulated to regarding authenticity. I understand that Your Honor rejected that proposal, but also told the parties to be prepared to discuss authenticity with specificity here today. So with that in mind, the parties have discussed earlier this morning about what procedures to proceed by in order to make sure that all parties understand how authentication challenges will proceed. And we do have a proposal for Your Honor. And I believe we're on the same page as Groupon. I would like to read that into the record and make sure that we're all on the same page.

THE COURT: Okay.

MR. OUSSAYEF: So our proposal is that Groupon will disclose all exhibits relevant to invalidity that it will use at trial on June

29th. And that's the date that Your Honor ordered with respect to narrowing contentions.

And on that date, then IBM will later identify its authenticity objections with respect to those exhibits on July 3rd, 2018. So that's a few days afterwards. And the parties will meet and confer regarding those authenticity objections with specificity on July 7th, 2018.

And in that way, the universe of potential exhibits with authentication challenges will be narrowed before the parties discuss authenticity with specificity and try to narrow the issues in dispute.

THE COURT: In the course of that, there was some back and forth about witnesses and who might come to lay a foundation if need be. What does your proposal say about that?

MR. OUSSAYEF: There is no specific proposal with regard to that. Your Honor, IBM's position would be that on the witness list there is no person identified with specificity regarding custodians that could testify about authenticity. So it's IBM's

position that Groupon has not disclosed any witness, it has simply said that it reserves the right to bring a custodian, presumably to be named later that we have no idea who that is. To the extent Groupon wanted to preserve a witness to testify about authenticity, it had the opportunity to do so and has not done so. So IBM would ask the Court to strike the reference to unnamed custodians because there is no information that IBM can use to prepare its case with regard to who those custodians would be. And even if Groupon was of the perspective that there should be no authenticity objection, then it should have doubly made sure to put witnesses on its witness list to address any authentication challenges.

THE COURT: Thank you. Let me hear from Groupon.

MS. SHAMILOV: Your Honor, I think generally the agreement was correctly read, but there is a wrinkle to that. So this will resolve the authenticity objections to invalidity type of exhibits, but IBM is objecting to other documents on our exhibit list

on this ground. And we're not sure yet what the nature of that objection is because they're actually authenticity objections to documents that are on IBM own list and to documents that IBM itself produced in this case, and so when we discussed before coming into the courtroom, we also, at least Karim can correct me if I'm wrong, agreed that on June 29th when we will identify which particular invalidity references they may bring up in trial, IBM will identify their own non-prior art exhibits on our list, it will continue to maintain an authentication objection and then we can cure whatever that objection is in the parties' discussions as outlined by Karim and in agreements July 3rd and July 7th.

As to the witness on our list, we have no -- because we don't have an idea, right now every single invalidity reference on our list is objected as not authenticated. We have no idea what the specific objections will be at issue here. And so once those are identified, we'll be able to cure any issues to the extent IBM raises any specifically in this proposal, so

we don't agree that we cannot raise the issue. I think also the authentication objections are something Your Honor will probably decide, and so we can sort of resolve those disputes outside of the jury hopefully and that won't need to be an issue in front of the jury.

THE COURT: Okay. Thank you.

Mr. Oussayef.

MR. OUSSAYEF: Yes, I do have a point of clarification, Your Honor.

THE COURT: Okay.

MR. OUSSAYEF: So we went back and looked at the exhibits that we objected to on authentication grounds, and we don't understand what exhibits there are that are not related to prior art that Groupon intends to rely that we objected to on authentication. So we would propose that to the extent there is an exhibit that's there that is for something other than prior art that Groupon would identify that they intend to use that exhibit, too, because from our perspective, we see, for example, the screen shot of a website that's kind of bare but that we don't know what it is, and that's our

authentication objection. And we're not sure, perhaps Groupon intends to use it for something other than prior art, but from our perspective, it looks like the exhibits where we objected to authentication are ones that they're intending to use it on prior art. To the extent that they're using it for something different, we would ask that they identify that so that we understand the context of where those exhibits are being used.

THE COURT: Is it not correct that you've agreed before coming in today that by June 29th, you will let them know of any other documents that you object to based on authentication issues?

MR. OUSSAYEF: So the procedure, Your Honor, we outlined is by June 29th, they will identify the exhibits that they intend to use for prior art purposes, and then we'll identify our authenticity objections with specificity with respect to those objections. We think that all of the things that we have objected to on authentication grounds are things that are relevant to prior art, but to the

extent there is not, we want to know what they are going to be used for.

THE COURT: All right.

MS. SHAMILOV: I think I can clearly resolve this if IBM represents that they're not objecting on authenticity basis to anything that's not going to be used, solely for documents that we may use for prior art. For example, there are screen shots from Groupon's website that are being objected to on authenticity basis. That is not a prior art issue.

So long as IBM's position is that their authentication objection is only to prior art references, I think our proposal that we discussed will work and that means all the other authentication objections that are currently on our list are dropped. Other than that, I just don't see how else we will know what an authentication objection is to prior art.

THE COURT: What's IBM's response?

MR. OUSSAYEF: I think there is a way, Your Honor, that this can all be avoided which is that Groupon can just identify which

exhibits it intends to use that have authenticity challenges, you know, pending on them, and then we will identify our authentication challenges with specificity, regardless of whether they pertain to prior art or not. There is a small handful, a couple of dozens of objections on authenticity. It's pretty manageable. It should be much more manageable once we get to a situation where we know what the universe of prior art is. To the extent there is a handful of exhibits that Groupon intends to use at trial that doesn't relate to prior art, we'll understand what those exhibits are, too, and we'll be able to figure out exactly what's at issue.

THE COURT: Is that agreeable?

MS. SHAMILOV: I cannot agree to that, Your Honor, because they're asking for a preview of exhibits that we're going to use at trial that are not prior art related. We seek when trial commences, outside of the strategy of trial, to identify exhibits. So I think -- I mean, I think it's what -- they have objected to the authentication stipulation which was

reasonable. I think it's for IBM to identify with specificity what it is that they believe is not authentic outside of the prior art realm on the date when we will identify the prior art. And then we can resolve the issues hopefully before the trial commences.

THE COURT: Here what is we're going to do. I'm directing that you all meet and confer and get me a revised proposal by the end of the day tomorrow. You have the outlines of a proposal, but I don't think it's fair to ask the defendant to disclose exhibits they're going to use at trial for which the plaintiff has an unspecified authentication objection. It's for the plaintiff to identify which, if any, authentication objections it wants to press based on what it knows at this point.

Now, I'm not saying that it's a bad idea for the defendant to disclose what prior art documents it's going to use. I think that's a good idea, but in parallel with that, somehow the plaintiff has to identify for the defendant what else it might want to press an authentication exhibit on, so there is going to

have to be a series of steps. I'm fine with you all concluding that process with a meet and confer on July 7th.

I'm going to add to it that by let's say July 8th, you get a joint status report to me so I know whether there are any remaining objections to authentication that are ripe and if so, how you propose to deal with it. I'm hoping the day doesn't come, but if it does, I can tell you I think I would probably let the defendant produce a witness or witnesses if that's the only way to authenticate these exhibits. I don't think that they're unfairly prejudicing the plaintiff in not being able to identify with specificity the individuals when the plaintiffs have not yet specified exactly why they're objecting based on authentication grounds. But exactly what we'll do after July 8th to resolve any remaining objections, I'll look for your proposals first.

But get me some kind of proposal tomorrow for how we're going to get there. Any questions about that?

MR. OUSSAYEF: No, Your Honor.

Thank you.

THE COURT: Any questions?

MS. SHAMILOV: No, Your Honor.

THE COURT: Let's talk about the issue of closing the courtroom. You saw my inclination not to close the courtroom. Does IBM want to talk about that?

MS. STEMPLER: Yes, Your Honor. Thank you. On the issue of clearing the courtroom, IBM has an active licensing practice and there are confidential sensitive financial terms in its license agreements. To the extent that those terms get disclosed, that can injure IBM because it would give competitors or potential future licensees the ability to undercut IBM in future negotiations. It also would reveal information about IBM's licensing strategy. Not only does it harm IBM, disclosure would harm the non-licensee parties to those agreements because they also have accepted the terms and the confidential financial terms of those agreements.

On balance the injury to the IBM nonparty outweighs any interest the public could

have in having access to the detailed terms of IBM's confidential agreements. This isn't a case where everything is centered on a core dispute involving license terms. And the sealing would really pertain to a handful of witnesses and to select portions of their testimony.

In contrast, if it's an open courtroom, IBM will have to notify the licensees of the potential for disclosure and give the licensees an opportunity to intervene and seek further protection from the Court.

THE COURT: Should I understand that the licensees are not aware of this potentiality?

MS. STEMPLER: So when we had to produce the license agreement we had to notify them of production under the protective order and their licenses would be designated outside counsel eyes only and that was the disclosure that they agreed to at the time. Obviously when the licenses are disclosed in open court, that's a different level of disclosure, so we would have to reach out again to notify them of the --

THE COURT: I guess the question occurs to me, how do I know that any of these third parties even care or that they would view themselves as being injured?

MS. STEMPLER: The licensees said they were okay with disclosure under the protective order on the outside counsel eyes only basis, suggesting that if it was anything more than that, that they would want to be notified. These are confidential terms that they have agreed to and having that become public it could harm them in the future because other parties would know what they've agreed to.

I would add that if the Court is not inclined to seal the courtroom completely, then IBM would respectfully request that another way to deal with this could be to the extent license agreements are admitted into evidence, admit those under seal, and while the witness is testifying about them to not publish the contents of the license agreements on the court monitors.

THE COURT: And how is IBM injured and how do I weigh that against IBM wants to use

these licenses and use the Court's time and the resources including citizens sitting on a jury to ask for quite a lot of money?

MS. STEMPLER: So the license agreements in terms of IBM's use of the license agreements, they would be used to -- really it would be a discussion of IBM's licensing practices and to show that these patents have been successfully licensed in the past. The issue really lies with the Groupon's damages expert who has an analysis where he's going to be talking about the amounts that these nonparty licensees paid for a license to the patent, and that's really where there is the sensitive financial information that would be harmful to both IBM and the nonparty licensees because then other parties would know and the public would know about the amount that they're willing to accept or to pay.

THE COURT: I see that they would know, but you brought this lawsuit. These are relevant documents. You want to use them at least in part affirmatively it sounds like because you want to talk about your successful

licensing of them, of the patents. In doing the balancing that you suggest I need to do, I'm just having a hard time seeing why that balance at all favors IBM on this point.

MS. STEMPLER: I think it's just that the injury in terms of the harm to IBM would be that in the future other companies would know the confidential financial terms that were acceptable to IBM and would be able to undercut IBM in negotiations perhaps, and just that IBM's licensing strategy, detailed licensing strategy and detailed financial terms would be disclosed. And that's really the heart of the injury. And the financial information of the nonparty licensees as well.

THE COURT: Okay. Thank you. We'll hear from Groupon both on this and if you're still asking that we close the courtroom for other information.

MR. HADDEN: No, we are fine with Your Honor's proposal to leave the courtroom open.

On the licensing, you know, as Your Honor notes, IBM is asking for a lot of

money in this case. And it is using these licenses both as an argument to show that the patents are valid and being used. And those licenses are going to be a key aspect of this case, both on damages and to rebut that argument by showing what people actually paid for these licenses. To come in here and claim $250 million and then try to hide the ball as to what the actual licensees who took licenses paid is not fair, Your Honor.

In addition, the licenses provide a defense to us on the '346 patent, so we're going to need to discuss the specific terms of those licenses as well as the amounts which is clearly relevant to damages.

So if there is an issue with notifying the third parties, IBM could have notified the third parties. And knew it was going to trial. It's been chugging along there for months. There is no prejudice.

THE COURT: I assume if I made this an order that the courtroom is going to be opened that they will notify third parties if they presumably have obligation to do so. I

don't know. They suggest at least in the papers that there could be some sort of administrative nightmare coming for all of us once they notify all of those third parties. Are you concerned about that?

MR. HADDEN: I'm not concerned about it. I think they should notify them already if they haven't, and I would be surprised if they haven't.

THE COURT: Okay. Thank you.

MR. HADDEN: Thank you.

THE COURT: Anything else?

MS. STEMPLER: Just to clarify, Your Honor, with respect to your question about the public, there is no harm in the public not knowing about the details of confidential terms of IBM's license agreements. The jury will have access to that. The public will still be able to understand the disputes that are at issue in this case without having access to the content and the detailed information within those agreements. I just wanted to further address the question that you asked at the end.

THE COURT: Okay. Thank you. I'm

going to adhere to my inclination and make it an order at this point, and I'll try to explain it. So at this point I don't anticipate closing the courtroom at all during the trial. Groupon is no longer asking that I close it with respect to discussions of source code, so that's a nonissue.

I recognize IBM's concerns, but I think, you know, the courtroom is presumptively open. The public has a First Amendment right for reasons that are well settled and that we probably all understand. So I have to think about what harm or prejudice has been asserted that might begin to rise to that level or that I should weigh against the public's interest and here I just don't find it persuasive. IBM I think should have known when they filed this case that it's quite likely that their licensing strategy and the specific terms of license agreements would become public should they be seeking damages, which they have been from the beginning, and it's not a surprise they're still seeking damages should the validity of their patents be challenged, and it's not a surprise

that the validity of the patents had been challenged, should there be a licensing defense, which there is a licensing defense, there has been in this case for quite some time, so I think in order to understand this case, it's important that the public have access to the information on which the jury is going to make their decision. And I don't think any injury to IBM comes close to being significant enough to lead to me closing the courtroom.

With that said, there is reference to third parties. I have nothing in front of me that indicates that any third party is in any way injured or sufficiently injured to ask me to do anything about that injury. There is what, four weeks until trial. You know, if I hear from third parties and they ask me to evaluate this further, I'm sure that I will, you know, have to pay attention to whatever they say. But you know, both sides will have a chance to be heard on that. And if I have to reevaluate, I'll reevaluate.

The only further thing I would say is I do want the parties to confer with one

another as we get close to this case where these exhibits would be used, there might be some redactions that I would approve of. If they're sensitive stuff that is truly irrelevant to the issues being tried, then perhaps the parties will agree that can be redacted and if they don't agree, perhaps I'll be persuaded to redact it, but until any further order of the Court, this trial will be fully opened to the public.

Any questions about that?

MS. STEMPLER: No, Your Honor.

THE COURT: Any questions?

MR. HADDEN: No, Your Honor.

THE COURT: Okay. In terms of when you call experts and I do the voir dire basically and then at a certain point offer the expert for a certain purpose, I want you to make sure that you have conferred with the other side about what language you're going to use when you say we hereby offer this expert for whatever, patent damages or whatever the case may be. I don't want to have to deal with objections to that language that you use. So disclose that proposed language sufficiently in advance that

if the other side has a concern with it and you can't work it out, you can raise it with me before that witness is called to the stand.

Any questions about that?

MR. DESMARAIS: No, Your Honor. That makes sense.

MR. HADDEN: No, Your Honor.

THE COURT: In terms of voir dire and the preliminary instructions, so I have made a number of rulings already since you submitted those last week including you now know I have approved of the juror questionnaire. You will have those responses at least some time before jury selection.

You should also know, here is the way I'll do jury selection. Some of you have already seen it. But the jury pool will be brought into the courtroom. They'll be in those benches behind all of you. I will read something about the nature of the case, and I will read all of the questions to them. They'll all be in yes, no format and there won't be any follow-up built into the questions that I ask because I will ask each of the members of the

jury pool just to think to themselves without standing up, without raising their hand, without talking in court whether they have a yes to any question. And then we'll move into my jury room and my staff will bring in jurors one by one who tell my staff that they answered yes to something and then when they come in, I'll make a record with them by asking them do you know what you answered yes to. I may ask a little bit of follow-up, and then I will give each side a chance for a very brief, if necessary, follow-up questioning.

All that is a long way of saying I want you all to put together a new version of the voir dire as well as the preliminary instructions. I'm talking about the voir dire now that is consistent with that approach as well as the rulings that I have given you, and any rulings that might be forthcoming because I don't need to see that again until July 11th. So work together and get me something.

And so among other things I'm hopeful you'll all agree on a very brief statement that I could read to the jury about

what this case is about. I don't think they need a lot of detail at the very beginning and I think you should be able to work that out.

Also on July 11th, get me an updated version of the preliminary instructions. You had a lot of disputes in the version you submitted the other day. I would be hopeful that maybe you'll work some of those out, but whether you do or not, get me a new verdict on July 11th.

Before I ask you if you have questions about that, another question I want to hear your views on is am I going to be asked to tell the jury pool that they are not to use Groupon during the course of this trial? This is an issue that comes up when very popular internet programs are on trial, so if plaintiffs can speak to that and if you have any questions about what I see about voir dire and preliminary instructions.

MR. DESMARAIS: John Desmarais for IBM. No questions about the voir dire or preliminary instructions. I do think that we would want you to tell the jury not to use the

internet, not to use Google searches, not to research the case. And I think in this particular case that would have applicability here because they're going to hear our theory of infringement and if they're on the Groupon website, they can do their practical test of whether they agree with us or not. It seems very dangerous to us.

THE COURT: Okay. Groupon?

MR. HADDEN: Your Honor, I think your standard instructions to tell the jury not to go do their own research, I don't see any reason to instruct them not to use Groupon during the course of the trial.

THE COURT: The problem is we all know, I think, that just using Groupon would in effect be doing research. I mean, they could see some of the functionality that they're going to hear about during the course of the trial.

MR. HADDEN: I think that's different than going on and Googling to find out about some technical feature. I think if they're Groupon users, they're used to using Groupon. Whether they do it during the trial or

not is not going to affect what goes on in the jury room.

THE COURT: Mr. Desmarais, anything further that?

MR. DESMARAIS: I would just be repeating myself, Your Honor. I think you understand our position.

THE COURT: I see that I raised the problem for myself, but it was going to come up eventually I suspect. I don't have an answer to the question. I have had trials with Facebook, I have had trials with Google, and that's why I thought I should bring it up, because the issue, if I don't deal with it upfront, someone will ask me over the course of a couple of weeks, you know, is it okay for me to use Facebook or something to that effect.

I'm going to ask you all to think about it further. If you form a joint position, let me know that right away and I'll stop worrying about it. If you don't, then I will make a decision by the time we select the jury whether I'm going to tell them anything about if they can use Groupon or not.

In terms of final jury instructions and the proposed verdict sheet, I will need you to revise those as well. For that I'm going to give you until July 18th, which I think is the first Wednesday of trial. So I hope that you will continue to meet and confer, and as you refine your cases, I think some of those disputes at least will go away.

To the extent there are remaining disputes and the verdict is on the 18th, we will find a time during the time of the trial for you to argue those and that's one of the few things that I don't charge time for during trial.

So let's talk about time at this point. You probably understand that other than the whole jury selection process and me reading the preliminary instructions and me reading final instructions, and any argument we have about the verdict sheet and the jury instructions, other than that, I think it's safe to say that if I'm on the bench, somebody is being charged time. The easy ones are your direct examination of a witness, your cross-examinations of a witness, your redirect

examinations of a witness, your opening and your closing arguments are all charged to you. When we meet in the mornings, because we will meet before the jury comes in each morning, if there are objections to admission of exhibits, for example, I'm going to charge all of the time to the objecting party, so whoever raises the objection will be charged for their time as well as the other side's response as well as whatever time it takes me to articulate my decision.

Obviously with that, and with everything, if I think somebody is abusing things, then I reserve the right to shift time or deduct time or whatever need be.

Expert objections or those objections to expert testimony being beyond the scope is one exception to the rule that I just explained, so on those we do our best to determine who won and who lost that objection. And whoever prevails on the objection is not charged any time for that objection. The party that did not prevail is charged all the time, so they're charged for their own argument, for the other side's argument, and for whatever time I

took to resolve the dispute. We let you know day by day where you are on time. And if you have any questions, you are to let us know and we'll do our best to resolve them as quickly as possible.

All that said, you saw that I think you can do this in 18 hours, but I will hear argument for up to 20 hours. Now would be the time to argue for more time or to ask more questions about how we're going to keep track of time.

First from the plaintiff.

MR. DESMARAIS: We are comfortable with 18 hours.

THE COURT: How about defendant?

MR. HADDEN: Your Honor, given that all four patents are going to stand in the case, we think 20 would be helpful, Your Honor.

THE COURT: Okay. And any questions about the time, Mr. Hadden?

MR. HADDEN: No questions, Your Honor.

THE COURT: Mr. Desmarais?

MR. DESMARAIS: No questions, Your

Honor.

THE COURT: All right. I don't think you need 20, but I will give you the 20.

MR. HADDEN: Thank you, Your Honor.

THE COURT: So we'll enter an order to make sure that each side has 20 hours now.

Let me ask you this. We have had occasion, including very recently, where a party does not save any material amount of time for their closing argument and that becomes difficult for the jury. Other judges, including judges in this court, I think either separately count time for closing. I'm not going to do that. You have 20 hours, that's set. But what I'm contemplating doing is keeping a certain amount of that in a bank and not letting you touch it until we get to closings. I haven't tried that before, but I'm thinking about it. Any thoughts on whether I should do that and if I were to do that, how much should I put in the bank and not let you touch. Mr. Desmarais?

MR. DESMARAIS: I think an

hour-and-a-half would be a good amount of time for closing. If you wanted to do that, that would be a fair amount for us.

THE COURT: You have no objection to me telling you there is 90 minutes you can't touch until we get to closing?

MR. DESMARAIS: No objection, Your Honor.

THE COURT: What do defendants think?

MR. HADDEN: That's fine, Your Honor. Since he gets to go twice at closing, maybe save an hour for me.

THE COURT: Well, we'll try this. I'll save an hour for both of you. So you have 20 hours, but unless you make a persuasive pitch sometime when you get close to 19 hours that you want to dip into your retirement savings, I'm going to hold on to that last hour and give it to you only when we get to closing arguments.

Okay. That was pretty much my list of things I wanted to make sure to raise with you, other than mechanics of how we'll run the courtroom, which I'll get to, but are there

issues that IBM wanted to raise that I didn't get to?

MR. OUSSAYEF: Yes, Your Honor.

THE COURT: Okay.

MR. OUSSAYEF: The parties have reached a couple of agreements that I thought I would just read into the record to make sure we're all on the same page. The first is the parties have agreed that they will identify each witness that they intend to call at trial by 6:00 p.m. two days before the party intends to call that witness.

THE COURT: Is that agreeable?

MS. SHAMILOV: That's agreeable, in light of the Court's instructions that once we proposed exhibits, they're going to --

MR. OUSSAYEF: I think that's already in the order in terms of a specific procedure for when and how to disclose exhibits as opposed to the witnesses themselves.

THE COURT: And you're in agreement on that and you haven't changed from what you proposed in the order; correct?

MS. SHAMILOV: Correct.

THE COURT: That's fine. Go on.

MR. OUSSAYEF: The second issue is regarding the Court's motion in limine regarding pre-suit communications. The Court's reasoning was based in part on the fact that Groupon had stipulated to particular dates of notice. Those dates of notice are no longer in the pretrial order and I believe that was the -- the parties have agreed to put that information back in the pretrial order.

And specifically what that information is is that Groupon first became aware of U.S. Patent Number 5,796,967, and U.S. Patent Number 7,072,849 on November 1st, 2011.

Groupon first became aware of U.S. Patent Number 5,961,601 on April 13th, 2012. And Groupon first became aware of U.S. Patent Number 7,631,346 on August 11th, 2014.

THE COURT: That's all agreed?

MS. SHAMILOV: Those are not precisely the dates we agreed on.

THE COURT: Why don't you two confer and make sure we get it right.

MR. OUSSAYEF: Your Honor, I

believe there is some minor question about the exact wording that was in the original pretrial order so the parties I think will confer about exactly what that language was and I believe the best way to do it is to amend the pretrial order and I believe the parties will be able to reach agreement.

THE COURT: Just submit, unless you disagree, a proposed stipulation with the language and the dates and do that sometime before trial, obviously.

MR. OUSSAYEF: Yes, Your Honor. Thank you.

THE COURT: Is that it for those agreements?

MR. OUSSAYEF: Yes, that's correct.

THE COURT: How about other things that IBM wants to raise?

MR. OUSSAYEF: Nothing further from IBM.

THE COURT: How about Groupon?

MS. SHAMILOV: One issue, Your Honor.

THE COURT: Yes.

MS. SHAMILOV: It's an issue about witness lists, Your Honor. I don't know if Your Honor wants to decide it today, but I want to raise an issue. There is one expert witness that is identified as may call on IBM's list. That witness was not disclosed as an expert witness in our case. At some point during discovery IBM produced an expert report from the Priceline case that that particular expert issued there, along with a whole bunch of other documents from the Priceline case during discovery. At no point was that witness identified on Rule 26(t) report that was produced as part of the production of the Priceline documents had the, you know, the caption of the Priceline case, the documents reviewed related to sort of the Priceline complaint, and so we were never on notice that that particular witness is going to be an expert witness.

So we have asked IBM to remove that witness from the may call list, but as of now, IBM has not agreed to do that. So this is

an outstanding issue.

THE COURT: Which witness is this?

MS. SHAMILOV: I don't know if it's Dr. Stewart or Mr. Steward, but last name is Stewart.

THE COURT: Okay. All right. Let me hear from IBM if you wish to have the right to keep Stewart on the may call list.

MR. OUSSAYEF: Yes, Your Honor. IBM's position is that IBM's damages expert and IBM's technical expert witness both rely on this Stewart report that was produced in this case and also in the Priceline case. And IBM has Dr. Stewart on its witness list in case Groupon intends to challenge the basis for the damages or for the technical experts reliance on that.

We don't believe that Groupon will do so because there is no specific challenging of the Stewart report or the basis for those surveys in -- the reports are disclosed during expert discovery, but in the case that Groupon does choose to make an issue out of it, that is why Dr. Stewart is on the exhibit list.

THE COURT: Dr. Stewart did a

survey that the other two experts relied on?

MR. OUSSAYEF: Yes, Your Honor. Everything was disclosed in discovery in terms of what is required under the disclosure rules for expert witnesses.

THE COURT: All right.

MS. SHAMILOV: On the last point, that's not actually accurate, Rule 26, for example, requires disclosure of all previous engagements of an expert. The only engagement that were produced in the case, that was disclosed in the Priceline case and that was only through 2016 that was attached to the report. If the experts relied on the report and want to talk about it in trial consistent with opinions disclosed in the report, they can do that. I don't think that means that IBM gets to call another expert witness who was never disclosed as an expert in our case and it's simply a report from another case that was produced as part of fact discovery along with other actual expert reports from that Priceline case. Dr. Stewart should not be an expert witness called here live at trial.

THE COURT: Are you reserving the right to question the other two experts who rely on Stewart about Stewart because Mr. Oussayef suggest maybe this is a nonissue?

MS. SHAMILOV: Well, I think we might question him about the opinions that they have reached based on, you know, whatever documents they may -- unless we know exactly what they're going to say, as of now we're intending to challenge their opinion. But I do say that regardless of how we're going to cross-examine their witnesses, I don't think that let's them under federal rules to bring a new expert witness that they never disclosed as an expert witness in our case, Your Honor.

THE COURT: Okay. Thank you. Anything else?

MR. OUSSAYEF: Just briefly, Your Honor. Your Honor, I believe this is analogous to what Your Honor decided on the authenticity issue. We don't have specificity over how Groupon intends to challenge or even if they do intend to put this at issue in terms of what the connection is between the damages and technical

experts reliance on the survey expert and what might become an issue. If they intend to disclose what they're going to do in terms of questioning, you know, the witnesses on the reliance on the survey expert, then that -- those issues will become relevant and that's when we would call Dr. Stewart. In the eventuality that we chose not to do so there would be no need to do so.

I believe it's analogous to the authentication issue where we should be -- we should be able to rely on Dr. Stewart if Groupon puts that issue to their own choice.

THE COURT: It sounds like maybe he's a rebuttal type witness. Is this the kind of thing that, you know, we don't necessarily need to decide now and see how things play out and if after you see the cross of your other two experts, you think you need Dr. Stewart we can decide at that point whether you can bring him for your rebuttal?

MR. OUSSAYEF: Yes, Your Honor, that's exactly the case.

THE COURT: Would that work for

defendants?

MS. SHAMILOV: That would only work, Your Honor, if we get an opportunity to depose Dr. Stewart before he takes the stand. We didn't know he would be an expert testifying in this trial. He can't just take the stand without being able to depose him first.

THE COURT: Would you object to a short deposition in that circumstance?

MR. OUSSAYEF: No, Your Honor.

THE COURT: Does that resolve it for now.

MS. SHAMILOV: For now it does. We still reserve our objection to them calling Dr. Stewart.

THE COURT: I don't think you need more from me on that. If it were to play out that way that there was an objection, plaintiff will let defendant know that they wish to call Dr. Stewart as part of their rebuttal, we will have the entirety of defendant's case at that point in which to find time for a short deposition. If they don't put him up for a deposition, I won't let them call him on

rebuttal. Even if they do, if you want to renew your argument that I shouldn't allow him anyway, you can raise it then.

Any other arguments for Groupon?

MR. HADDEN: No, Your Honor.

THE COURT: Let me quickly run through some of the mechanics of the pretrial order and mechanics of the trial and/or if you do have other questions. With respect to the pretrial order, if the parties did not identify a dispute on a certain topic and we haven't talked about it today and I didn't say anything about it in my order last week, then it is acceptable and it is hereby adopted.

In terms of uncontested facts, as I think you put in the order these facts may be read to the jury by either side provided that you give notice to the other side that you're going to do it. And whoever stands up to read them will be charged time for doing that.

In terms of the factual issues to be tried, I asked you already my questions about where I thought there might be some uncertainty about what issues are going to be tried, does

IBM believe there is any dispute as to what is going to be in dispute as the factual issues in this trial?

MR. DESMARAIS: No, Your Honor.

THE COURT: Does Groupon have any concerns about that.

MR. HADDEN: No, Your Honor.

THE COURT: In terms of the legal issues, we really handled those mostly in the context of the jury instruction. I already talked about how you will submit another version and you'll have a chance to argue any remaining disputes during trial. So I don't propose to provide anything further in terms of legal guidance now.

Exhibits, exhibits on the exhibit list in the pretrial order that are not objected to on the exhibit list are received into evidence by operation of the pretrial order once the exhibit is shown to a witness and offered into evidence and the Court says it's admitted. So that means if there is no objections, you don't need to lay a foundation, but you do have to say at some point when the witness is on the

stand, A, you have to show it to some witness, and B, you have to offer it into evidence at some point either at the beginning, during or at the end of the examination of the witness. And I will ask as a formal manner whether the other side objects to the admission of that exhibit. We know you'll say no, but we still go through that whole process.

We do that same thing with respect to exhibits for which there are objections on the exhibit list. Those you usually narrow them down once you see the actual exhibits that are going to be used on direct, you meet and confer. If there are still outstanding objections the morning that you expect that witness to be called, you'll bring those to my attention in the morning. I will do my best to rule on them.

Let's suppose that I have ruled on all of them, so let's just suppose I have overruled the objections to amend the document, we'll still go through that process of once you show the exhibit to the witness at some point you'll say we offer this exhibit into evidence, I will ask the other side is there any

objection, you will say no, but we all know that you did object, your objection is clear in the record, you're not waiving it, but as far as the jury is concerned, there is no objection to any exhibit coming in. Any question about how we deal with objections and exhibits?

MR. DESMARAIS: No Your Honor.

MR. HADDEN: Just one question, Your Honor.

THE COURT: Yes.

MR. HADDEN: Can an unobjected to exhibit be shown to the jury before it is offered in?

THE COURT: You mean like in opening statement?

MR. HADDEN: Or also with the witness who is going to --

THE COURT: If you know in good faith that it's coming into evidence in that circumstance, you would know, then you can use it before it comes into evidence.

MR. HADDEN: Thank you, Your Honor.

THE COURT: All right. In terms

of witnesses who are testifying by deposition, if you're playing the video, if you want to run the transcript underneath the video, you need to make sure the other side knows that so when you disclose to the other side here is exactly what we're going to play, either show them that it's going to have a transcript or at least tell them. We have had disputes coming up during trial that the parties aren't sure that the other side wants to put the transcript on. It's hard to deal with during the trial. If there are going to be objections, I need to know about that before you call that witness.

In terms of objections to expert testimony, as we talked about, I will rule on those objections during trial. As I said, the time will be charged to the party that does not prevail on that objection. As hopefully you understand, I will not have read or memorized all of the expert disclosures that are made prior to trial, so you need to come prepared with copies of your expert reports, declaration, deposition testimony, so that if there is an objection to certain testimony as being beyond

the scope, you will be able to hand me everything the expert has said previously. You'll be expected to be able to point to me where it is that the expert fairly disclosed the opinion that's now being challenged and I'll do my best to as quickly as possible review that so that I can make a decision as to who prevails on that objection.

Examination of all witnesses is limited to direct and cross and redirect. We don't have recross-examination. You need to ask for leave to approach a witness once for a witness. If you have asked once for a witness, you can assume that leave has been freely granted and you can move back and forth as you wish in examining that witness.

We do encourage transition statements. Jurors usually really appreciate that, just a brief non-argumentative statement just telling the jurors who the witness is and, you know, whatever they're here to talk about, infringement, they're here to talk about damages, whatever the case may be.

Any questions about any of that?

MR. DESMARAIS: No, Your Honor.

MR. HADDEN: No, Your Honor.

THE COURT: We talked about jury selection. The only other thing I'll add, we end up with a jury of eight, none of whom are treated as alternatives, so whether we have six, seven or eight left when it's time for deliberations, all of those who are still with us will deliberate.

Any question about that?

MR. DESMARAIS: No, Your Honor.

THE COURT: Any questions?

MR. HADDEN: No, Your Honor.

THE COURT: All right. And then my list of what I call petty stuff, which happily I don't think has grown lately. In general, no chewing gum. No sucking candy. No eating in the courtroom. That applies to you, your witnesses, your clients, anyone within your control. Please let them know that. If there were some medical or other reason that you needed to do any of those things, I will let you do it, but please just approach my staff and let us know, otherwise we'll assume that you're not

complying with our rules. You can drink water in the courtroom, but only water. The electronic devices that are in the courtroom are for aid in the trial presentation, for preparation of the trail presentation, they're not for searching Groupon or doing deals or -- I have to say that at least once during this trial, you can have the devices but they're for the purposes of the trial presentation. Please turn your cell phones and your other devices off. Please don't wear hats in the courtroom. Please don't wear sunglasses in the courtroom. And please don't read large newspapers in the courtroom.

And this list is all derived from experience from seeing all of these things multiple times. Any questions about any of that?

MR. DESMARAIS: No, Your Honor.

MR. HADDEN: No, Your Honor.

THE COURT: If you were to make any submissions after the normal trial day or on weekends or on holidays, please make sure to send a courtesy copy by e-mail. We have a

chambers e-mail address. I will read it to you now in case you don't have it. It is Judge_Stark_chambers@ded, for Delaware District,.uscourts, with an S, .gov. So it's Judge_Stark_chambers@ded.gov, so if you are filing anything at those unusual times, please make sure to send a courtesy copy to that e-mail address.

That was all I have. Have I raised any other questions in anybody's mind, first from IBM?

MR. DESMARAIS: I did have one question about your practice on impeachment. Do you allow video clips or is it just the transcript?

THE COURT: Right. Impeachment of prior inconsistent testimony, you can use video clips. I think that you all indicated you wanted to have the opportunity to make objections for incompleteness or for lack of inconsistency, so if that's how you want to do it, that's fine. But that means you have to pause at least a brief amount of time before you show a video clip so that the other side has a

chance to say we have an objection. It's not an objection that it's a video, it's an objection that it's incomplete or it's not actually impeaching. To do all that, you have to call out with clarity what it is, where you're going, what day, what line, what page, et cetera. Any further questions about that or anything else?

MR. DESMARAIS: No, that's good, Your Honor. Thank you.

THE COURT: Any questions about that or anything else?

MR. HADDEN: No, Your Honor.

THE COURT: Thank you all very much. We'll look for your submissions and we'll see you in July.

(Concluded at 2:15 p.m.)

State of Delaware)
)
New Castle County)

CERTIFICATE OF REPORTER

I, Dale C. Hawkins, Registered Merit Reporter, Certified Shorthand Reporter, and Notary Public, do hereby certify that the foregoing record, is a true and accurate transcript of my stenographic notes taken on June 18, 2018, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 22nd day of June 2018, at Wilmington.

/s/ Dale C. Hawkins

Dale C. Hawkins, RMR